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EDITOR'S NOTE

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(SHDKT) PROCEEDINGS AND ORDERS DATE: 120485

CASE NBR 84-1-01852 CSY
SHORT TITLE Pennsylvania
VERSUS Goldhammer, Benjamin

CASE STATUS: DECIDED
DOCKETED: May 24 1985

Entry	Date	Note	Proceedings and Orders
1	May 24 1985	G	Petition for writ of certiorari filed.
2	Jun 25 1985		DISTRIBUTED. September 30, 1985
3	Jun 26 1985	X	Brief of respondent Benjamin Goldhammer in opposition filed.
4	Jun 26 1985	G	Motion of respondent for leave to proceed in forma pauperis filed.
5	Jul 25 1985	X	Reply brief of petitioner Pennsylvania filed.
7	Oct 7 1985		REDISTRIBUTED. October 11, 1985
9	Oct 16 1985		Record requested (SOC)
10	Oct 24 1985		Record filed.
11	Oct 24 1985		Certified original record and briefs received. (Box).
12	Oct 21 1985		REDISTRIBUTED. November 1, 1985
14	Nov 4 1985		REDISTRIBUTED. November 8, 1985
15	Nov 12 1985		Motion of respondent for leave to proceed in forma pauperis GRANTED.
16	Nov 12 1985		Petition GRANTED. Judgment REVERSED and case REMANDED

CONTINUE (

PROCEEDINGS AND ORDERS DATE: 120485

CASE NBR 84-1-01852 CSY
SHORT TITLE Pennsylvania
VERSUS Goldhammer, Benjamin

CASE STATUS: DECIDED
DOCKETED: May 24 1985

Entry	Date	Note	Proceedings and Orders
16	Nov 12 1985		Petition GRANTED. Judgment REVERSED and case REMANDED Justice Brennan dissents from summary disposition and would vote to deny the petition. Dissenting statement by Justice Marshall from the summary disposition. Justice Blackmun would grant the petition and set the case for argument. Dissenting opinion by Justice Stevens. Opinion per curiam.

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PETITION FOR WRIT OF CERTIORARI

84-1852

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

NO. _____

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

BENJAMIN GOLDHAMMER,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED

1. Does the Double Jeopardy Clause bar resentencing when the trial court's sentencing scheme is upset by the appellate reversal of one count of a multi-count conviction?

2. Does the Double Jeopardy Clause limit resentencing on valid convictions to cases in which defendants have been reconvicted after new trials gained through appeal?

3. Is the Due Process Clause implicated when a trial court resentences a defendant on affirmed counts, after one of a multi-count conviction is reversed on appeal, even though the new sentence does not exceed the original aggregate sentence?

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APPENDICES

TABLE OF CITATIONS

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

NO. _____

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

BENJAMIN GOLDHAMMER,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

Petitioner, the Commonwealth of Pennsylvania, respectfully requests that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of Pennsylvania entered in this case on March 29, 1985.

OPINIONS BELOW

The Opinion below and Judgment of the Pennsylvania Supreme Court, which is unofficially reported at 489 A.2d 1307, but

which has not yet been officially reported, is set forth in full in Appendix A, infra at 1A-37A. The Opinion below of the Pennsylvania Superior Court, which was filed November 10, 1983, but is unreported, is set forth in full in Appendix B, infra at 1B-11B.

STATEMENT OF JURISDICTION

The judgment of the Pennsylvania Supreme Court was entered on March 29, 1985. The jurisdiction of this Court is invoked pursuant to 23 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Five, which provides:

> No person shall be ... subject for the same offence to be twice put in jeopardy of life or limb; ... nor be deprived of life, liberty, or property, without due process of law; ...

United States Constitution, Amendment Fourteen, which provides:

> ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Following a bench trial in the Philadelphia Court of Common Pleas, respondent was convicted of fifty-six (56) counts of theft by unlawful taking and fifty-six (56) counts of forgery. Respondent, over a four year period beginning in November, 1974, stole from the Philadelphia company for which he was comptroller more than two hundred twenty thousand dollars ($220,000).

A criminal complaint was issued on October 1, 1979, charging multiple thefts and forgeries over a four year period. The statute of limitations for theft was then ordinarily two years. The Commonwealth, however, relied on a statutory exception, extending that limitation period for crimes involving fraud or breach of fiduciary duty, and, therefore, charged respondent with theft for checks written between November, 1974, and October, 1977.

The trial judge found respondent guilty of fifty-six (56) counts each of theft and forgery but sentenced him only to consecutive one (1) to five (5) year prison sentences on one theft count and one forgery count. Sentence was suspended on the remaining counts. At respondent's request, the trial court later reduced the sentence by imposing a two to five year prison term for theft and a concurrent five year probationary period for forgery. Respondent appealed all one hundred twelve (112) convictions and remained free, on bail, throughout his appeal.

On November 10, 1983, the Superior Court of Pennsylvania held the statutory exception extending the statute of limitations inapplicable and reversed thirty-four (34) theft convictions arising out of forgeries committed before October, 1977. Commonwealth v. Goldhammer, memorandum

opinion, No. 1107, Philadelphia 1981 (Pa. Super. filed Nov. 10, 1983). Included in these thirty-four (34) discharges was the one and only count on which respondent was sentenced to prison. The Superior Court ignored the Commonwealth's request to remand the remaining counts to the trial court for resentencing.

The Pennsylvania Supreme Court affirmed the Superior Court order discharging the thirty-four (34) theft convictions as beyond the statute of limitations. Again, the Commonwealth requested that the remaining seventy-eight (78) convictions be vacated and remanded to allow the trial court to resentence in accordance with its original intent and to prevent respondent from escaping punishment for this criminal scheme. The Pennsylvania Supreme Court held, however, that resentencing was barred by the Double Jeopardy

Clause of the United States Constitution. Commonwealth v. Goldhammer, ___ Pa. ___, 489 A.2d 1307 (1985). The Commonwealth of Pennsylvania now seeks this Court's review of that decision.

REASONS FOR GRANTING THE WRIT

THE PENNSYLVANIA SUPREME COURT'S INTERPRETATION OF THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION IS CONTRARY TO THIS COURT'S INTERPRETATION, CONFLICTS WITH NUMEROUS DECISIONS OF THE FEDERAL CIRCUIT COURTS AND LEADS TO UNJUST AND UNREASONABLE RESULTS.

This Court has left open the recurrent and important question of whether a defendant who succeeds, on appeal, in challenging one of several related sentences can be resentenced on the undisturbed counts. United States v. Busic, 446 U.S. 398, 411 n.19 (1980). The question is of the greatest significance to justice systems of every jurisdiction. Its resolution will determine whether trial courts can impose appropriate and just sentences or whether, when judges stumble in fashioning lawful sentences for complex, multi-count convictions,

defendants will receive undeserved windfalls.

The federal circuit courts and state courts have heretofore extensively litigated this significant question without the benefit of this Court's guidance. The Pennsylvania Supreme Court, however, without reference to any of the relevant authority or, indeed, to the contrary trend in the federal courts, here held that the United States Constitution requires that respondent go unpunished for seventy-eight (78) lawful convictions and bars the trial court from resentencing in accord with its original intent. This Court should review that ill-based decision.

Most federal circuits and state courts which have considered this issue find such resentencing consistent with

the Double Jeopardy Clause.[1] Pennsylvania, in concluding otherwise, ignored this pertinent authority and this Court's relevant, recent holding in United States v. DeFrancesco, 449 U.S. 117 (1980). Instead, the state court looked for "guidance" to the now discredited 1874

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[1] On remand, the Third Circuit Court of Appeals decided the issue left open by this Court, holding that the Double Jeopardy Clause did not bar resentencing. United States v. Busic, 639 F.2d 940 (3d Cir. 1981), cert. denied, 452 U.S. 918 (1981). Accord United States v. Sales, 725 F.2d 458 (8th Cir. 1984); United States v. Gomberg, 715 F.2d 843 (3d Cir. 1983); United States v. Raimondo, 721 F.2d 476 (4th Cir. 1983), cert. denied, ___ U.S. ___, 105 S. Ct. 133 (1984); United States v. Moore, 710 F.2d 271 (6th Cir. 1983); United States v. Jefferson, 714 F.2d 689 (7th Cir. 1983); United States v. Woodward, 726 F.2d 1320 (9th Cir. 1983); United States v. Hagler, 709 F.2d 578 (9th Cir. 1983), cert. denied, __ U.S. ___, 104 S. Ct. 282 (1983); McClain v. United States, 676 F.2d 917 (2d Cir. 1982), cert. denied, 459 U.S. 879 (1982); see also United States v. Henry, 709 F.2d 298 (5th Cir. 1983) (Gee, Clark, Brown, Johnson, Garwood, Higginbotham, JJ., dissenting) (case decided on statutory grounds).

decision of Ex Parte Lange, 85 U.S. (18 Wall.) 163 (1874). This decision is no longer relevant to the questions presented here. These questions are peculiar to contemporary criminal legislation and jurisprudence and must be answered in light of this Court's recent relevant pronouncements.

Relying nonetheless on Ex Parte Lange, old Pennsylvania cases which followed Ex Parte Lange, and North Carolina v. Pearce, 395 U.S. 711 (1969), the state court concluded that, once imposed, a valid sentence may be increased only upon reconviction after the grant of a new trial, and, then, based only on subsequent conduct of the defendant (Appendix A at 30A). Thus, the court accorded sentences the same constitutional finality as acquittals and forbade resentencing after related counts are reversed on appeal. The state court also

repeated the notion, mistakenly based on Ex Parte Lange, that a defendant may not be resentenced once he has begun serving his sentence (Appendix A at 32A). All of these conclusions, ostensibly required by the United States Constitution, are inconsistent with this Court's holdings.[2]

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[2]The Pennsylvania Supreme Court eschewed any possible independent state ground. That court relied exclusively on federal cases interpreting the United States Constitution or on state cases which, in turn, were based exclusively on federal precedent. See Commonwealth v. Silverman, 442 Pa. 211, 275 A.2d 308 (1971); Commonwealth v. Allen, 443 Pa. 96, 277 A.2d 803 (1971); Commonwealth v. Brown, 455 Pa. 274, 314 A.2d 506 (1974).

Even where state grounds are intermixed in a lower court's holding, this Court has held that such reliance on federal grounds warrants review by this Court. Oregon v. Kennedy, 456 U.S. 667 (1982). Moreover, there is no possible independent state ground in the Pennsylvania Constitution. The state Double Jeopardy Clause, Const. Art. I, §10, is co-extensive with the federal Double Jeopardy Clause. Commonwealth v. Goldhammer, ___ Pa. ___, 489 A.2d 1307 (1985); Commonwealth v. Klobuchir, 486 Pa. 241, 405 A.2d 881 (1979).

(Footnote 2 continued on next page.)

In DiFrancesco, this Court upheld a statute which permitted the government, after the defendant had been sentenced as a "dangerous special offender," to seek an increase in sentence and stated clearly that "a sentence does not have the qualities of constitutional finality that attend an acquittal." 449 U.S. at 134. Ignoring that pronouncement, the state court "limited" North Carolina v. Pearce, which permits increased sentences upon reconviction after a new trial, to cases where the defendant has gained a new trial on appeal. This Court expressly rejected that idea as "no more than a 'conceptual

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(Footnote 2 continued from previous page.)

As the Pennsylvania Supreme Court stated on the very day it decided this case, since these provisions are co-extensive, "a separate discussion of our interpretation under Article I §10 is unnecessary." Commonwealth v. Zoller, slip op., No. 26 W.D. Appeal Docket 1984 (Pa. filed March 29, 1985).

nicety.'" 449 U.S. at 135-136. DiFrancesco also explicitly discredited the long, but mistakenly, held idea that sentences could never be increased once service of the sentence has begun. 449 U.S. at 138-139. Instead, this Court limited Ex Parte Lange's ban on increasing existing sentences to situations in which the defendant had already satisfied his sentence and further sentencing would exceed that authorized by the legislature. The "Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be." 449 U.S. at 137. The Pennsylvania Supreme Court "interpreted" the federal Double Jeopardy Clause contrarily to its meaning as determined by this Court.

The Pennsylvania Supreme Court further erred when it concluded that the

requested resentencing would violate due process. So long as the aggregate sentence is not increased, the due process protections against vindictiveness or deterrence of appeal are inapplicable. United States v. Busic, 639 F.2d at 951 n.12. Further, even if considered as an "increase" on individual counts, as long as the trial judge explains his reasons and those reasons are not vindictive, due process is not violated. United States v. Wasman, ___ U.S. ___, 104 S. Ct. 3217 (1984); see also United States v. Henry, 709 F.2d at 324-326.

In DiFrancesco, this Court concluded that the "guarantee against multiple punishment that has evolved in the holdings of this Court plainly is not involved" when the government succeeds in increasing a defendant's sentence on appeal. 449 U.S. at 139. The Double Jeopardy Clause is

implicated even less in this case where (1) the Commonwealth has never suggested that respondent's aggregate sentence may be increased, and (2) the increase on an individual count was not, and could not be, initiated by the government, but became necessary only after defendant upset the trial court's sentencing scheme on appeal.

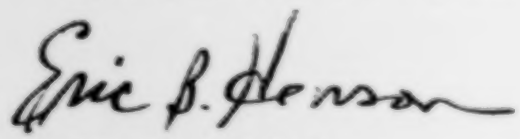
The Double Jeopardy guarantee against multiple punishments was never designed to frustrate the sentencing intentions of trial courts by prohibiting correction of errors, either clerical or legal. The Pennsylvania Supreme Court, however, has turned this shield against multiple punishments into a sword by which defendants can avoid punishment altogether. Asserting the authority of the United States Constitution, Pennsylvania has allowed what this Court would not -- "the guilty to escape punishment through a legal

accident." Pollard v. United States, 352 U.S. 354, 361 (1957). As this Court stated in permitting the trial court to correct a sentencing error in Bozza v. United States, 330 U.S. 160, 166-167 (1947), "[t]he Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." Pennsylvania has nonetheless granted respondent this immunity for his seventy-eight valid convictions.

CONCLUSION

For all the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that a Writ of Certiorari issue to review the decision below.

Respectfully submitted,



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May 24, 1985

IN THE SUPREME COURT
OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA, Petitioner	:	OCTOBER TERM, 1984
v.	:	
BENJAMIN GOLDHAMMER, Respondent	:	NO.

CERTIFICATION OF SERVICE

I, ERIC B. HENSON, Counsel for Petitioner, hereby certify that on this 24th day of May, 1985, three (3) copies of this Petition for Writ of Certiorari to the Supreme Court of Pennsylvania were mailed, postage prepaid, to Stanford Shmukler, Esquire, 2400 Packard Building, 15th and Chestnut Streets, Philadelphia, Pennsylvania 19102, Counsel for Respondent.

Eric B. Henson

ERIC B. HENSON
Deputy District Attorney
District Attorney's Office
1300 Chestnut Street
Philadelphia, Pa. 19107

Sworn to and subscribed :
before me this 24th day :
of May, 1985, A.D. :

NOTARY PUBLIC

My Commission Expires:

JOYCE N. WHITE
Notary Public, Phila., Phila. Co.
My Commission Expires Sept. 19, 1987

SUPREME COURT OF PENNSYLVANIA

Eastern District

COMMONWEALTH OF PENNSYLVANIA, Appellant	:	NO. 83 E.D. APPEAL DOCKET, 1984
v.	:	
BENJAMIN GOLD-HAMMER	:	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the Order of the SUPERIOR COURT, be, and the same is hereby AFFIRMED.

BY THE COURT:

/s/
Marlene F. Lachman, Esq.
Prothonotary

DATED: March 29, 1985

[J-10-1985]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellant	:	No. 83 E.D. Appeal Dkt. 1984
	:	Appeal from the November 10, 1983 Superior Court Order entered at No. 1107, Philadelphia 1981, Reversing the Judgments of Sentence Imposed by the Court of Common Pleas of Phila. County, Trial Div., Criminal Section, on Nos. 1857 through 1862, 1866 through 1875, 1879 through 1888 and 1907 through 1914, December Session, 1979.
v.	:	
	:	___ Pa. Super. ___,
	:	469 A.2d 601 (1983)
BENJAMIN GOLDHAMMER, Appellee	:	ARGUED: 1/22/85

OPINION

NIX, C. J. Filed: March 29, 1985

In the instant matter the Commonwealth appeals an order of the Superior

Court in which thirty-four (34) of appellee's fifty-six (56) theft convictions were reversed on the ground that they were barred by a two-year statute of limitations. 42 Pa.C.S. §5552(a). The Commonwealth's primary argument is that the statute of limitations was tolled when it alleged in the information that the offense contained as a material element either fraud or breach of fiduciary obligation thereby constituting an exception under 42 Pa.C.S. §5552(c)(1). In the alternative, the Commonwealth contends that this Court should order a remand instructing the trial court to resentence appellee on the remaining convictions.

I.

For approximately four years Appellee Goldhammer provided a relatively comfortable life for his family while

working as controller for Lessner and Company, Inc. ("Lessner"). One day in February, 1979, however, appellee suffered a heart attack while on vacation in Las Vegas. From that point his fortunes changed. During Mr. Goldhammer's absence due to illness the president of Lessner, Henry J. Lessner, began to review the company's bank statements and cancelled checks and discovered irregularities. It was determined that between November, 1974 and January, 1979, appellee had augmented his less-than-Fifteen-Thousand-Dollar-($15,000)-per-year salary by some Two Hundred Twenty Thousand Dollars ($220,000). He had, without authorization, signed his name and forged the signature of the company's secretary-treasurer to fifty-six (56) corporate checks which he either cashed

or deposited in his personal checking account. To conceal his crimes, appellee falsified the company books to reflect that the checks were drawn to pay various company accounts.

A criminal complaint was issued against appellee on October 1, 1979. Informations were later returned against appellee charging fifty-six (56) counts each of theft by unlawful taking, 18 Pa.C.S. §3921; forgery, 18 Pa.C.S. §4101; and theft by failure to make required disposition of funds received, 18 Pa.C.S. §3927. The numerous informations charging theft by unlawful taking each stated:

> The District Attorney of Philadelphia County does further inform that the above offense contains a material element which is either fraud or breach of fiduciary obligation and constitutes an exception under Section 108 of the Crimes Code and 42 Pa.C.S.A. §5552.

At the preliminary hearing appellee filed an omnibus motion requesting, inter alia, that all of the theft charges be quashed on the ground that they were barred by the statute of limitations. This motion was denied and, on November 24, 1980, appellee was convicted of the fifty-six (56) counts each of theft by unlawful taking and forgery.[1] Appellee was initially sentenced on March 3, 1981 to two consecutive one-to-five-year prison terms representing conviction on one theft count and one forgery count. Sentence was suspended on the remaining counts. Upon reconsideration, however, the court imposed only a two-to-five-year prison term for the theft count and imposed a concurrent five-year probation

---

1. Appellee was acquitted of the fifty-six (56) counts of theft by failure to make required disposition of funds received, 18 Pa.C.S. §3927.

for the forgery count. Sentence was again suspended on the remaining counts.

On November 10, 1983, the Superior Court vacated all of appellee's theft convictions for crimes committed before October, 1977 on the ground that they were barred by the two-year statute of limitations provided for in section 5552(a). Included among the convictions reversed was the one and only count on which appellee was sentenced to serve a prison term. The Commonwealth appealed to this Court and we granted review.[2] For the following reasons we now affirm the decision below.

II.

We address first whether under section 5552 the Commonwealth could

---

2. This Court is vested with jurisdiction of this discretionary appeal pursuant to 42 Pa.C.S. §724.

extend the two-year limitation period for the offense of theft by unlawful taking by alleging in the information that such offense contains as a material element either fraud or breach of fiduciary duty. While the question before us has been touched upon by the Superior Court, see, e.g., Commonwealth v. Hawkins, 294 Pa. Super. 57, 439 A.2d 748 (1982); Commonwealth v. Eackles, 286 Pa. Super. 146, 428 A.2d 614 (1981); we have yet to lend our guidance on this issue. We will begin our analysis by briefly discussing the role of the statutes of limitations in Pennsylvania criminal law.

The statute of limitations, which provides predictable legislatively enacted limitations on prosecutorial delay, is the primary guarantee against the bringing of overly stale criminal charges. United States v. Lovasco, 431

U.S. 783, 789 (1977). As we stated in Commonwealth v. Cardonick, 448 Pa. 322, 292 A.2d 402 (1972):

> The Supreme Court observed in Toussie v. United States, 397 U.S. 112, 90 S. Ct. 858 (1970): "The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity." Id. at 114-15, 90 S. Ct. at 860. The burden of defending against long completed conduct is onerous because "[a]s time passes, witnesses upon whom the defendant may need to rely die or move away; events are forgotten and records lost, particularly if the events seemed unimportant at the time of occurrence." Note, The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution, 102 U. Pa. L. Rev. 630, 632 (1954).

Id. at 332-33, 292 A.2d at 407-08.

We have concluded, therefore, that statutes of limitations must be liberally construed in favor of the defendant and against the Commonwealth. Id. at 330, 292 A.2d at 407.

With that standard of construction in mind, we now turn to an examination of the pertinent parts of the statute of limitations involved in the case at bar. Prior to the amendment of May 13, 1982,[3] 42 Pa.C.S. §5552 provided in pertinent

---

3. Subsection (b) of section 5552 now provides in pertinent part:

> (b) Major offenses.--A prosecution for any of the following offenses must be commenced within five years after it is committed:
> (1)
> ....
> Section 3921 (relating to theft by unlawful taking or disposition....)
> ....
> 42 Pa.C.S. §5552(b)(1) (Supp. 1984-1985).

part:

§5552. Other offenses

(a) General rule.--Except as otherwise provided in this subchapter, a prosecution for an offense other than murder or voluntary manslaughter must be commenced within two years after it is committed.

(b) Major offenses.--A prosecution for any of the following offenses under Title 18 (relating to crimes and offenses) must be commenced within five years after it is committed:

Section 3123 (relating to involuntary deviate sexual intercourse).
Section 3301 (relating to arson and related offenses).
Section 3502 (relating to burglary).
Section 3701 (relating to robbery).
Section 4101 (relating to forgery).
Section 4902 (relating to perjury).

(c) Exceptions.--If the period prescribed in subsection (a) or subsection (b) has expired, a prosecution may nevertheless be commenced for:

(1) Any offense a material element of which is either fraud or a breach of fiduciary obligation within one year after discovery of the offense

> by an aggrieved party or by a person who has a legal duty to represent an aggrieved party and who is himself not a party to the offense, but in no case shall this paragraph extend the period of limitation otherwise applicable by more than three years.
>
> ...

Under a plain meaning interpretation of this statute, the two-year limitation period is excepted if the offense charged contains as a material element either fraud or a breach of fiduciary obligation. Thus we must determine whether theft by unlawful taking contains as a material element either fraud or a breach of fiduciary obligation.

Theft by unlawful taking is statutorily defined by 18 Pa.C.S. §3921:

> §3921. Theft by unlawful taking or disposition
>
> (a) Movable property.--A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with intent to deprive him thereof.
>
> (b) Immovable property.--A person is guilty of theft if he un-

> lawfully transfers, or exercises unlawful control over, immovable property of another or any interest therein with intent to benefit himself or another not entitled thereto.

The legislature has defined "Material element of an offense" at section 103 of the Crimes Code:

> An element that does not relate exclusively to the statute of limitations, jurisdiction, venue or to any other matter similarly unconnected with: (1) the harm or evil incident to conduct, sought to be prevented by the law defining the offense; or (2) the existence of a justification or excuse for such conduct.
>
> 18 Pa.C.S. §103.

Thus to be considered a material element of the crime of theft by unlawful taking, fraud or breach of fiduciary duty must be connected with the harm or evil sought to be prevented by section 3921 of the Crimes Code, 18 Pa.C.S. §3921, namely, the unlawful taking of the property of another. We find no such nexus exists.

First, it is clear that section 3921

on its face makes neither fraud nor breach of fiduciary duty an element required to sustain a conviction for theft by unlawful taking. Under subsection (a) of section 3921, the Commonwealth must prove that the defendant (1) unlawfully took or exercised control over (2) the movable property of another (3) with intent to deprive him thereof. Subsection (b) requires proof that the defendant (1) unlawfully transferred or exercised control over (2) immovable property of another or any interest therin (3) with intent to benefit himself or a third party not entitled to such benefit. Neither the manner in which the unlawful taking, transfer or exercise of control is accomplished nor the relationship between the defendant and the property owner need be shown in order to establish that the defendant has committed the

offense. Thus neither fraud nor breach of fiduciary duty is an element of the Commonwealth's case-in-chief.

Second, while the legislature properly seeks to discourage fraudulent conduct and violation by fiduciaries of their entrusted duties, see generally Chapter 41 of the Crimes Code, 18 Pa.C.S. §§4101 et seq., the conduct made culpable under section 3921 is the deliberate and unlawful taking of someone else's property for oneself. We discern no relevant connection between fraud or breach of fiduciary duty and "the harm or evil incident to conduct, sought to be prevented by the law defining the offense." 18 Pa.C.S. §103. Thus we conclude that neither fraud nor breach of fiduciary duty may be deemed a "material element of the offense" of unlawful taking for purposes of section 5552(c) of

the Judicial Code, 42 Pa.C.S. §5552(c).

The Commonwealth, relying on Commonwealth v. Eackles, supra, argues that an allegation in any information that fraud or breach of fiduciary duty is a material element of the offense is sufficient to toll the statute of limitations under section 5552(c)(1). In Eackles the Commonwealth failed to include such an allegation in its information but sought to invoke the exception on the basis of evidence adduced at trial. The Superior Court held that "[w]hen the Commonwealth seeks to toll the statute under this section, it must allege the exception in the information or otherwise apprise defendant within a reasonable time that it intends to toll the statute of limitations." Commonwealth v. Eackles, supra at 155, 438 A.2d at 619. With this

holding we have no quarrel. Clearly the defendant must be given notice of the Commonwealth's intention to seek to toll the statute of limitations. See Commonwealth v. Stockard, 489 Pa. 209, 413 A.2d 1088 (1980). Notice alone, however, is not dispositive. There remains the substantive requirement that the allegation must be a correct statement of the law. In other words, it must not only be pleaded that the offense contains a material element of fraud or breach of fiduciary duty, the definition of the offense must also include such an element. A contrary rule would undermine the policies underlying the two-year statute of limitations and, in effect, permit the Commonwealth to extend the statute of limitations for the prosecution of any offense merely by reciting in the information the

boilerplate allegation that the offense contained a material element of fraud or breach of fiduciary duty, regardless of whether the offense charged in fact contains such an element.

The Commonwealth in essence is contending that we should interpret section 5552(c)(1) as providing for its application whenever under the given facts of the case the offense was accomplished by fraud or a breach of fiduciary obligation. While this may well have been a reasonable approach for the legislature to have followed, the fact remains that they did not choose to employ such a formulation. The legislature expressly required that the fraud or breach of a fiduciary obligation be "a material element." Their intent was further clarified by an express definition of the term "material element

of an offense." To ignore such an explicit expression of legislative intent would require that we overlook even the most basic precepts of statutory construction. See, Zimmerman v. O'Bannon, 497 Pa. 551, 442 A.2d 674 (1982); In re Fox's Estate, 494 Pa. 584, 431 A.2d 1008 (1981); In re Stegmaier's Estate, 424 Pa. 4, 225 A.2d 566 (1967); Commonwealth v. Rieck Investment Corp., 419 Pa. 52, 213 A.2d 277 (1965); Davis v. Sulcowe, 416 Pa. 138, 205 A.2d 89 (1964); Southwest Delaware County Municipal Authority v. Aston Township, 413 Pa. 526, 198 A.2d 867 (1964); Milk Control Commission v. Penn Fruit Co., 410 Pa. 242, 188 A.2d 705 (1963); Rich v. Meadville Park Theatre Corp., 360 Pa. 338, 62 A.2d 1 (1948); Commonwealth v. Sun Ray Drug Co., 360 Pa. 230, 61 A.2d 350 (1948); Palmer v. O'Hara, 359 Pa. 213, 58 A.2d 574 (1948); Commonwealth ex

rel. Cartwright v. Cartwright, 350 Pa. 638, 40 A.2d 30 (1945). This we decline to do.

Since neither fraud nor breach of fiduciary duty is an element of theft by unlawful taking as that crime has been defined by the legislature, the Commonwealth could not properly invoke section 5552(c)(1) to toll the applicable two-year statute of limitations. The Superior Court's order reversing the thirty-four (34) convictions for thefts committed more than two years prior to the filing of the criminal complaints must therefore be affirmed.

III.

In the alternative, the Commonwealth urges this Court to remand the case to the trial court for resentencing on the remaining theft and forgery convictions. The Commonwealth states in its brief,

"Unless this Court reverses that decision, and at least permits a resentencing proceeding, defendant will escape the prison sentence which the trial court intended he serve despite the affirmance of fifty-six (56) forgery convictions and twenty-two (22) theft convictions." Appellant's brief at 12. The Commonwealth maintains that the present result allows appellee to "effectively escape punishment" and defeats "the trial court's clear intention to punish defendant's entire criminal course of conduct." Id. at 6. Nevertheless, our focus here is not upon the outrage that one convicted of seventy-eight (78) counts may never serve a day behind bars. Rather we must determine whether we can jurisdictionally and constitutionally grant the relief sought by the Commonwealth.

We must first address appellee's contention that the issue of resentencing is not properly before this Court. Appellee argues that, because he did not appeal the Superior Court's affirmance of the judgments of sentence on his forgery convictions, those sentences are final and may not be disturbed on appeal to this Court. This argument misapprehends the posture of the instant appeal. The legitimacy of those judgments of sentence and their underlying convictions is not at issue. Rather, the Commonwealth is arguing that the Superior Court erred in failing to remand this case for resentencing upon its reversal of the convictions and sentences on the theft charges. Thus this assignment of error relates not to the judgments of sentence upheld by the Superior Court but to the proper course of action to be taken by

that court in the wake of its invalidation of the prison sentence imposed. Such a question of law is a proper subject for our review.

We must now determine whether a remand for resentencing in the instant case would offend the constitutional protections against double jeopardy.[4] Specifically, the question before us is whether a defendant who, through successful appeal, has had some of his convictions vacated on the ground that

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4.
In Benton v. Maryland, 395 U.S. 784 (1969), the double jeopardy clause of the Fifth Amendment to the United States Constitution was held applicable to the states through the Fourteenth Amendment. Article I §10 of the Constitution of this Commonwealth affords protection co-extensive with that afforded under the federal double jeopardy clause. Commonwealth v. Zoller, et al., ___ Pa. ___, ___ A.2d ___, n.1 (J-123-1984; filed March 29, 1985); Commonwealth v. Klobuchir, 486 Pa. 241, 254 n.12, 405 A.2d 881, 887-88 n.12 (1979).

the counts were barred by the statute of limitations, may be resentenced to increased terms on his remaining convictions. Presently appellee is serving five years probation for one count of forgery with sentence suspended on all remaining counts.[5] A review of

---

5.
Under Pennsylvania law we have rejected the view that a suspended sentence is an indefinite suspension of the sentencing power which permits the imposition of a prison sentence at some later time. We have held that the entry of a suspended sentence is an exhaustion of the sentencing power. See Commonwealth v. Duff, 414 Pa. 471, 200 A.2d 773 (1964). Thus such judgments of sentence are final and subject to the constraints of the double jeopardy protection.

While a probationary sentence does permit the subsequent entry of a prison sentence, the power to impose that subsequent sentence arises only where the terms of the probation are violated. 42 Pa.C.S. §9771(b); Commonwealth v. Pierce, 497 Pa. 437, 441 A.2d 1218 (1982); Commonwealth v. Vivian, 426 Pa. 192, 231 A.2d 301 (1967). Here, of course, there is no suggestion that the probationary terms have been violated.

case law in this area leads us to the conclusion that such resentencing would amount to double jeopardy.

A.

It long has been recognized that the constitutional guarantee barring double jeopardy protects against multiple punishments for the same offense. Illinois v. Vitale, 447 U.S. 410 (1980); United States v. Wilson, 420 U.S. 332 (1975); North Carolina v. Pearce, 395 U.S. 711 (1969); Ex parte Lange, 85 U.S. (18 Wall.) 163 (1874); Commonwealth v. Zoller, ___ Pa. ___, ___ A.2d ___, (J-123-1984; filed March 29, 1985); Commonwealth v. Bostic, 500 Pa. 345, 456 A.2d 1320 (1983); Commonwealth v. Houtz, 496 Pa. 345, 437 A.2d 385 (1981); Commonwealth v. Tarver, 493 Pa. 320, 426 A.2d 569 (1981); Commonwealth v. Starks, 490 Pa. 336, 416 A.2d 498 (1980);

Commonwealth v. Henderson, 482 Pa. 359, 393 A.2d 1146 (1978); Commonwealth v. Walker, 468 Pa. 323, 362 A.2d 227 (1976). Perhaps the strongest articulation of this principle is found in the 1878 [sic] United States Supreme Court decision in Ex parte Lange, supra. There the Court in holding that the trial court could not render second judgment against the prisoner after having once fully exercised its jurisdiction stated:

> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense.
>
> Id. at 168.

Later in the same opinion the Court queried:

> But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value?
>
> Id. at 173.

In answer to its question the Court concluded, "...we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it." Id.

One notable exception to the maxim stated in Ex parte Lange has been where the defendant is granted a new trial following appeal. In United States v. Ball, 163 U.S. 662 (1896), the Court held that the constitutional guarantee against double jeopardy posed no limitation

whatever upon the power to retry a defendant who has succeeded in getting his first conviction set aside. Following Ball, it was held in Stroud v. United States, 251 U.S. 15 (1919), that a corollary of the power to retry a defendant is the power, upon the defendant's reconviction, to impose whatever sentence legally authorized, whether or not it is greater than the sentence imposed after the first conviction.

The Stroud holding was refined in North Carolina v. Pearce, supra, where the Court analyzed the constitutional limitations upon the imposition of a more severe punishment after conviction for the same offense upon retrial. The Court noted that the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon

reconviction. Id. at 719. The Court stated that the rationale for allowing resentencing is that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean. Id. at 720-21. Although the Court held that the double jeopardy provision does not pose an absolute bar to the imposition of a more severe sentence upon reconviction, it cautioned that due process requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. Id. at 725.

> Whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the

time of the original sentencing proceeding.

Id. at 726.

The foregoing discussion of Supreme Court decisions establishes that a defendant cannot be twice lawfully sentenced for the same count unless at his behest he had been granted retrial and subsequently once again found guilty of the same count. Even in that situation, however, the Constitution prohibits imposition of a more severe punishment than the original sentence unless the judge can identify conduct on the part of the defendant occurring after the time of the original sentencing proceeding which warrants the imposition of a more severe sentence.

B.

In the case at bar, however, we are not faced with the imposition of a more severe sentence following reconviction.

Here sentences have been vacated on counts upon which, theoretically, appellee should never have been convicted. The Commonwealth now seeks to increase his remaining sentences. We reasoned in Commonwealth v. Silverman, 442 Pa. 211, 275 A.2d 308 (1971), cert. denied, 405 U.S. 1064 (1972), that the Pearce rationale, allowing increased sentences after reconviction, did not apply where the court attempted to increase existing sentences. Id. at 217, 275 A.2d at 312. In Silverman the trial judge, after entertaining second thoughts, sought to increase the original sentence imposed upon the defendant. We ruled that a modification of a sentence imposed on a criminal defendant which increases the punishment is double jeopardy. Id.

The Silverman holding was followed

in Commonwealth v. Allen, 443 Pa. 96, 277 A.2d 803 (1971), which also addressed the power of the court to alter and augment an existing sentence. In Allen the Commonwealth contended that the first sentence had been erroneously imposed and that the increase merely transposed the sentences to reflect the judge's true intention. Id. at 103. We reasoned:

> . . . [T]he Supreme Court long ago concluded that increasing a sentence after the defendant has commenced to serve it is a violation of the double jeopardy clause, Ex parte Lange, 85 U.S. (18 Wall.) 163 (1874), and we are in agreement with those jurisdictions holding there is no exception to Lange in the situation where the increase is allegedly designed to reflect the judge's true intent: United States v. Sacco, 367 F.2d 368 (2d Cir. 1966); Kennedy v. United States, 330 F.2d 26 (9th Cir. 1964); Duggins v. United States, 240 F.2d 479 (6th Cir. 1957). See, also, United States v. Welty, 426 F.2d 615 (3d Cir. 1970); United States v. Magliano, 336 F.2d 817 (4th Cir. 1974); Ekberg v. United States, 167 F.2d 380 (1st Cir. 1948). Although Bozza v. United States, 330 U.S. 160 (1947), indicated judicial

inadvertence in sentencing can be cured by increasing the sentence, that decision is inapposite for two reasons: (1) Bozza's original sentence was below the minimum mandatory sentence; and (2) the mistake was cured within five hours. Nor can the instant appeal be equated with the situation in Com. v. Meyer, 169 Pa. Superior Ct. 40, 82 A.2d 298 (1951), wherein it was held that a trial judge could correct a clerk's erroneous docket entry.

Lastly, we are of the opinion that such alleged inadvertence cannot be tolerated as a matter of public policy. As best stated by the Second Circuit, "[t]he possibility of abuses inherent in broad judicial power to increase sentences outweighs the possibility of windfalls to a few prisoners," 367 F.2d at 370.

Id. at 104-05, 277 A.2d at 807.

A few years later, we utilized the Allen reasoning in Commonwealth v. Brown, 455 Pa. 274, 314 A.2d 506 (1974). In that case the defendant was resentenced pursuant to a federal court order to eight and one-half to ten years for second degree murder. Three days later, however, the trial court amended his

sentence, increasing the maximum term to twenty years. The defendant appealed the trial court's action raising double jeopardy claims under both the Fifth Amendment to the United States Constitution and Article I, Section 10 of the Pennsylvania Constitution. We held that the claim that the sentencing judge made a mistake is of "no aid to the Commonwealth and the increased sentence was unlawful as being violative of double jeopardy." Id. at 276, 314 A.2d at 508.

C.

Here we are being requested to permit the trial court to alter a sentence legally imposed under an information because of a subsequent appellate court ruling vacating the sentence imposed on another information. We can perceive no reason why the double jeopardy implications would not apply

here as well as in the case where there is an attempt to increase a sentence to cure an error made in its entry by inadvertence. There are in fact strong arguments to be advanced why the request of the Commonwealth is an even clearer double jeopardy violation than that presented under the facts of the Brown decision. Here there is no question that the sentence imposed was what the sentencing judge intended it to be. This is underscored under the instant facts where the sentences were as a result of a resentencing.

The emotional argument of the Commonwealth, suggesting that a grave injustice would occur if we deny this relief, pales upon a critical analysis of the fact of this case. The trial court at resentencing had before him seventy-eight (78) informations upon

which sentences could have been imposed. The challenged validity of the theft charges was raised at the pretrial stage and was known to and ruled upon by the trial judge in the disposition of post-verdict motions. The trial court initially imposed a prison sentence on one theft count and one forgery count. In this factual setting the plea that the result reached by the Superior Court frustrated the trial judge's intent rings hollow. Here the trial judge elected after reconsideration to impose the prison sentence on only one of seventy-eight (78) charges and the one chosen was one he knew was being challenged as being barred by the statute of limitations.[6]

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6. It should also be noted that the sentencing judge resentenced appellee to a term of probation on the forgery count so that appellee would be eligible for parole sooner. Moreover, that judge stated on the record that he would not oppose a work release program for appellee if such a program was recommended by the Board of Probation and Parole.

Having previously concluded that double jeopardy prohibits a judge from: increasing an existing sentence where the judge, upon further reflection, determined that the sentence imposed was inadequate, Commonwealth v. Silverman, supra; increasing an existing legal sentence to reflect the judge's true intention, Commonwealth v. Allen, supra; or increasing a maximum sentence to cure an illegal minimum sentence, Commonwealth v. Brown, supra; it would be inexplicable to conclude that the Commonwealth's request in this appeal meets constitutional mandate.

For the reasons expressed above, we affirm the order of the Superior Court.

Mr. Justice McDermott dissents.

J-939 (1983)

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	No. 1107 Philadelphia 1981
BENJAMIN GOLD-HAMMER, Appellant	:	

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal Division, of Philadelphia County, December Term, 1979, Nos. 1857-2024.

Before: WICKERSHAM, WATKINS and MONTGOMERY, JJ.

OPINION PER CURIAM Filed Nov. 10, 1983

Appellant Benjamin Goldhammer was convicted of 56 counts each of theft by unlawful taking and forgery following a non-jury trial before the Honorable Michael E. Wallace. Post-trial motions were denied and appellant was sentenced to two consecutive sentences of imprisonment. The court granted appellant's petition for modification of sentence and resentenced him to a two to

five year term of imprisonment on one count of theft and five years probation on one count of forgery. Sentence on the remaining counts was suspended.

On this direct appeal, appellant raises the following issues:

(1) The court erred in refusing to suppress evidence obtained from appellant's attorney, from his bank and pursuant to an arrest warrant, the affidavit for which contained inaccurate information.

(2) The evidence was insufficient to sustain the forgery convictions.

(3) Many of the theft charges were barred by the statute of limitations.

We affirm in part and reverse in part.

Appellant had been employed as controller for Lessner and Company, Inc., a mechanical contracting corporation, since 1974. In February 1979, appellant suffered a heart attack while on vacation in Las Vegas. Henry J. Lessner, the president of the corporation, began to review the current bank statements and cancelled checks in appellant's absence. After investigation, he discovered a total of 57 checks[1] bearing the apparently forged signature of Richard J. Kates, one of the authorized signatories. It was ultimately discovered that these checks had either been cashed by appellant or deposited into his checking

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1. Appellant was charged with theft and forgery on all 57 checks but the charges as to one check were dismissed at the preliminary hearing.

account. The evidence presented at trial included certain of appellant's bank records which had been given to Lessner's counsel by appellant's counsel, records which had been obtained from appellant's bank pursuant to a lawful subpoena issued after appellant's arrest, testimony from Mr. Lessner and Mr. Kates, and the testimony of a questioned document examiner who compared the handwriting on the checks in question with exemplars obtained from appellant, Mr. Kates and Mr. Lessner.

Appellant first argues that the court should have suppressed the bank records obtained by Lessner's attorney from appellant's attorney. These records were volunteered to Lessner's attorney for the purpose of convincing Lessner that appellant had spent most of the money and to induce Lessner to accept a

settlement in the form of a second mortgage on appellant's house. No settlement was ever worked out and Lessner subsequently turned the bank records over to law enforcement officials after he had filed the criminal complaint. It has long been established that the Fourth Amendment's prohibition against illegal search and seizure applies only to the actions of governmental authorities, not to the actions of private persons. Burdeau v. McDowell, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 (1921). The government is precluded from using evidence obtained by a private person only if that person acted as an instrument or agent of the state. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The records in question were obtained by Lessner and his attorney long

prior to any governmental knowledge or action in this matter. Therefore, the court was correct in refusing to suppress this evidence.

Appellant further argues that the bank records obtained from Fidelity Bank should have been suppressed under Commonwealth v. DeJohn, 486 Pa. 32, 403 A.2d 1283 (1979). In DeJohn, the defendant's bank records were obtained pursuant to a concededly invalid subpoena at a time prior to the institution of criminal charges against her. The Supreme Court held that a bank depositor has a sufficient privacy interest in bank records so as to have standing to challenge the illegal seizure of same (i.e., pursuant to an invalid subpoena). In the instant case, the records were obtained pursuant to a valid warrant;

appellant advances no reason why the seizure is otherwise illegal. DeJohn does not compel suppression under these circumstances. Indeed, the Supreme Court in DeJohn noted that "A bank could always be compelled to turn over customer's records when served with a valid search warrant or some other type of valid legal process, such as a lawful subpoena." Commonwealth v. DeJohn, 486 Pa. 32, 48, 403 A.2d 1283, 1291 (1979). It was not, therefore, error to refuse to suppress the records obtained from Fidelity Bank.

Finally, appellant sought to suppress evidence obtained as a result of the arrest warrant because the affidavit contained a misstatement. In order to invalidate an arrest warrant, a misstatement of fact in the affidavit must be both material and deliberate.

Commonwealth v. Bradshaw, 290 Pa.Super. 162, 434 A.2d 181 (1981). It is undisputed that the misstatement in this case was unintentional. Moreover, the trial court found, and we agree, that deletion of the misstatement from the affidavit would still leave sufficient facts to establish probable cause. Therefore, the misstatement is not material, In Interest of Eckert, 260 Pa. Super. 161, 393 A.2d 1201 (1978), and suppression was properly denied.

Appellant next contends that the evidence was insufficient to support the forgery convictions because the convictions were based on expert testimony which was not "positive". We disagree. In reviewing such a claim, we view the evidence in the light most favorable to the Commonwealth, accepting

as true all the evidence and all reasonable inferences therefrom. Commonwealth v. Williams, 269 Pa.Super. 544, 410 A.2d 835 (1979). Our review of the record convinces us that the expert testimony combined with all the other evidence presented by the Commonwealth was sufficient to sustain the convictions.

Finally, appellant argues that certain of the theft convictions are barred by the statute of limitations.[2] The applicable statute of limitations for theft is two years. 42 Pa.C.S.A. §5552. The offenses involved herein occurred at various times between November 1974 and

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2. Because of our disposition of this issue, we need not deal with appellant's other arguments relating to the interpretation of this statute.

January 1979. The statute, however, contains the following exception:

> (c) Exceptions.-If the period prescribed in subsection (a) or subsection (b) has expired, a prosecution may nevertheless be commenced for:
>
> > (1) Any offense a material element of which is either fraud or a breach of fiduciary obligation within one year after discovery of the offense by an aggrieved party or by a person who has a legal duty to represent an aggrieved party and who is himself not party to the offense, but in no case shall this paragraph extend the period of limitation otherwise applicable by more than three years.

Citing Commonwealth v. Eackles, 286 Pa. Super. 146, 428 A.2d 614 (1981), appellant contends that neither fraud nor breach of fiduciary obligation is a material element of the crime of theft by unlawful taking. In Eackles, a panel of this court determined that the Commonwealth is not required to prove fraud in order to convict a person of

theft by unlawful taking; i.e., that fraud is not a material element of that crime. The Commonwealth would have us look at the particular facts of each case, determine whether fraud or breach of fiduciary duty was proven, and apply the exception to those cases where proof of fraud or breach of fiduciary duty is present. That is, however, precisely what the court in Eackles refused to do. We must, therefore, discharge appellant on those theft counts which occurred more than two years prior to the date the complaint was filed. See also, Commonwealth v. Hawkins, 294 Pa.Super. 57, 439 A.2d 748 (1982).

The judgment of sentence is reversed and appellant is discharged as to Bills #1857 through 1862, 1866 through 1875, 1879 through 1888, and 1907 through 1914; the judgment of sentence is affirmed as to all the other convictions.

OPPOSITION BRIEF

84-1852

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. 84-1852

COMMONWEALTH OF PENNSYLVANIA
Petitioner

v.

BENJAMIN GOLDHAMMER,
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel for Respondent

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Were there adequate state grounds to sustain the Pennsylvania Supreme Court's conclusion that a Defendant who, through successful appeal, has had some of his convictions vacated on the ground that the counts were barred by the statute of limitations, may not be resentenced to increased terms on his remaining convictions?

2. Does this Court's decision in United States v. DiFrancesco, 449 U.S. 117 (1980), permit resentencing to imprisonment on charges on which valid, suspended sentences were imposed, merely because a prison sentence on another charge was reversed on appeal?

3. Where the highest appellate court of the State concludes as a fact that a remand for resentencing is not necessitated to carry out the sentencing judge's intent, is that an adequate state ground which cannot be reviewed by this Court?

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NO. 84-1852

COMMONWEALTH OF PENNSYLVANIA
Petitioner

v.

BENJAMIN GOLDHAMMER,
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, BENJAMIN GOLDHAMMER, respectfully requests that the Petition for a Writ of Certiorari, to review the judgment and opinion of the Supreme Court of Pennsylvania entered in this case on March 29, 1985, be denied.

ADDITIONAL OPINIONS BELOW

The opinion of the Pennsylvania Superior Court, which was filed November 10, 1983, and was set forth in Appendix B of the Petition for Writ of Certiorari, has been reported in -Pa.-, 489 A.2d 1307 (1983). In addition, the opinion of the trial judge, which has not been officially reported, and which was not reproduced in the Petition for Writ of Certiorari, is set forth herein in Appendix A, infra, from 1A to 15A, infra.

JURISDICTION

Petitioner seeks review pursuant to 28 U.S.C. §1257(3)[1]. For the reasons stated below, Petitioner has not properly invoked this Court's jurisdiction.

ADDITIONAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Pennsylvania Constitution provides, in pertinent part:

> **Article 1, §10. Initiation of criminal proceedings; twice in jeopardy; eminent domain.**
>
> Except as hereinafter provided no person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, or by leave of the court for oppression or misdemeanor in office. Each of the several courts of common pleas may, with the approval of the Supreme Court, provide for the initiation of criminal proceedings therein by information filed in the manner provided by law. No person shall, for the same offense, be twice put in jeopardy of life or limb; nor shall private property be taken or applied to public use, without authority of law and without just compensaton being first made or secured.

The pertinent statute of limitations in Pennsylvania is set forth in 42 Pa.C.S.A. §5552:

> **§5552, Other offenses**
>
> (a) General rule. - Except as otherwise provided in this subchapter, a prosecution for an offense other than murder or voluntary manslaughter must be commenced within two years after it is committed.
>
> (b) Major offenses. - A prosecution for any of the following offenses under Title 18 (relating to crimes and offenses) must be commenced within five years after it is committed:
>
> Section 3123 (relating to involuntary deviate sexual intercourse).
>
> Section 3301 (relating to arson and related offenses).

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1 Incorrectly cited in the Petition as 23 U.S.C. §1257(3).

Section 3502 (relating to burglary).

Section 3701 (relating to robbery).

Section 4101 (relating to forgery).

Section 4902 (relating to perjury).[2]

(c) Exceptions. - If the period prescribed in subsection (a) or subsection (b) has expired, a prosecution may nevertheless be commenced for:

(1) Any offense a material element of which is either fraud or a breach of fiduciary obligation within one year after discovery of the offense by an aggrieved party or by a person who has a legal duty to represent an aggrieved party and who is himself not a party to the offense, but in no case shall this paragraph extend the period of limitation otherwise applicable by more than three years.

(2) Any offense committed by a public officer or employee in the course of or in connection with his office or employment at any time when the defendant is in public office or employment or within five years thereafter, but in no case shall this paragraph extend the period of limitation otherwise applicable by more than eight years. . .

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2 Section 5552(b) was amended after the trial and sentence in this case to provide for a five year statute of limitations on theft charges.

COUNTERSTATEMENT OF THE CASE

Following a bench trial in November 1980, Respondent (Defendant in the trial court) was convicted on 56 charges of theft by unlawful taking and 56 counts of forgery, and was acquitted on 56 counts of theft for failing to make required disposition. Although the Pennsylvania statute of limitations for forgery charges is five years, the statute on theft crimes is two years. However, there is an exception in the statute which extends the statute by one year after discovery of the offense, not to exceed three years, where a material element of the offense is fraud or breach of fiduciary obligation. Accordingly, the District Attorney alleged in the informations[3] that the theft offenses here involved fraud or breach of fiduciary duty. Respondent filed a pre-trial motion to dismiss all theft charges not filed within two years of the offense; the motion was denied by the trial judge. Following his conviction Respondent was sentenced to imprisonment of one to five years on forgery and to a consecutive term of imprisonment of one to five years on one theft charge. Sentences on all remaining charges were suspended. On a timely motion to reconsider sentence the trial court vacated the above sentence and resentenced Respondent to a term of imprisonment for two to five years on the theft charge, and to a concurrent term of probation for five years on the forgery charge. On all of the remaining charges sentence was suspended.

On appeal to the Superior Court of Pennsylvania, that Court held that the two year statute of limitations applied to the theft charges, and that the language added by the

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3 In Philadelphia indictments have been abolished, and replaced by informations, pursuant to Art. 1, §10 of the Pennsylvania Constitution, set out at p.2, supra.

District Attorney to the informations did not bring it within the statutory exception, since fraud or breach of fiduciary duty is not a material element of those offenses under Pennsylvania law. That Court therefore reversed the conviction on 34 of the theft charges, including the charge on which the imprisonment had been imposed. The Court affirmed the conviction on other theft charges brought within the two year period, and on all the forgery charges. The Superior Court refused a petition for reargument which contained a request by the Commonwealth to remand the remaining counts to the trial court for resentencing. By a vote of 6 - 1, the Pennsylvania Supreme Court affirmed the Superior Court, concluding first, that the Commonwealth could not extend the two year statute of limitations by alleging fraud, and second, that the Superior Court had been correct in refusing to remand for sentencing on charges on which sentence had been suspended.

The Commonwealth filed its Petition for Writ of Certiorari in this Court on May 24, 1985. This Brief in Opposition was mailed to the Clerk of this Court on June 24, 1985, pursuant to Rules 29.1 and 28.2.

REASONS FOR DENYING THE WRIT

1. There was adequate state ground for the decision of the Pennsylvania Supreme Court.

The Supreme Court of Pennsylvania concluded that under Pennsylvania law the entry of a suspended five year sentence on a charge exhausts the sentencing power of the court, Commonwealth v. Duff, 414 Pa. 471, 200 A.2d 770 (1964), and that the power to impose a prison sentence on such charges arises only when the terms of probation have been violated. See 42 Pa.C.S. §9771(b); Commonwealth v. Pierce, 497 Pa. 437, 441 A.2d 1218 (1982); Commonwealth v. Vivian, 426 Pa. 192, 231 A.2d 301 (1967). Here there was no allegation that Respondent violated any of the terms of his probation; the Commonwealth seeks to resentence only because Respondent was successful in his appeal of conviction of other charges.

The Supreme Court of Pennsylvania concluded that under Pennsylvania law, as well as under this Court's decisions, the trial court cannot constitutionally increase a validly imposed suspended sentence. In support of the proposition that the constitutional guarantee barring ... jeopardy protects against multiple punishments for the same offense, it cited four decisions of this Court[4], as well as seven Pennsylvania Supreme Court cases.[5] The Pennsylvania cases demonstrate that the Pennsylvania constitutional

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4 Illinois v. Vitali, 447 U.S. 410 (1980); United States v. Wilson, 420 U.S. 332 (1975); North Carolina v. Pearce, 395 U.S. 711 (1969); Ex Parte Lange, 85 U.S. (18 Wall.) 163 (1874).

5 Commonwealth v. Zoller, -Pa.-, -A.2d-(J.123-1984; filed March 25, 1985); Commonwealth v. Beatie, 500 Pa. 345, 456 A.2d 1320 (1983); Commonwealth v. Houtz, 496 Pa. 345, 437 A.2d 385 (1981); Commonwealth v. Tarver, 493 Pa. 320, 426 A.2d 569 (1981); Commonwealth v. Starks, 490 Pa. 336, 416 A.2d 498 (1980); Commonwealth v. Henderson, 482 Pa. 359, 393 A.2d 1146 (1978); Commonwealth v. Walker, 468 Pa. 323, 362 A.2d 227 (1976).

prohibition against double jeopardy, like the federal constitutional provision, prohibits not only trying someone twice for an offense, but punishing him twice for the same offense.

This is not a case in which defendant was granted a new trial following appeal, in which instance the defendant could be retried [United States v. Ball, 163 U.S. 662 (1896)], and resentenced [Stroud v. United States, 251 U.S. 15 (1919)], even to a more severe punishment [North Carolina v. Pearce, supra].

The Supreme Court relied upon two prior Pennsylvania Supreme Court decisions in support of its conclusion that the Pearce rationale allowing increased sentences after reconviction, did not apply where the court attempted to increase existing sentences. Commonwealth v. Silverman, 442 Pa. 211, 275 A.2d 308 (1971), cert. denied, 405 U.S. 1064 (1972); and Commonwealth v. Allen, 443 Pa. 96, 277 A.2d 803 (1971). In Silverman, the Pennsylvania Supreme Court held that the Fifth Amendment guarantee against double jeopardy means that "a modification of a sentence imposed, on a criminal defendant which increased the imprisonment is double jeopardy." Similarly, in Allen, the defendant was sentenced to imprisonment on one count and sentence was suspended on another count. Post-trial motions resulted in the granting of a new trial, following which defendant pleaded guilty and was sentenced to imprisonment on both counts. Defendant contested the lawfulness of the sentences, and the court resentenced on both counts, but still imposed jail sentences on both. The Pennsylvania Supreme Court reversed, concluding that a sentence cannot be increased unless the reason for the increase is based upon identifiable conduct on the part of appellant after the time of original sentencing. In Allen,

the Supreme Court specifically noted that inadvertence in sentencing cannot be tolerated as a matter of public policy. This clearly is based on State considerations, not those required by the federal constitution.

The Pennsylvania Court also relied upon Commonwealth v. Brown, 455 Pa. 274, 314 A.2d 506 (1974). In Brown, the sentencing judge attempted to amend and increase the maximum term of a prison sentence within three days of its imposition. The Commonwealth contended that the imposition of the longer maximum merely corrected a prior "slip of the tongue" of the sentencing judge. The Pennsylvania Supreme Court concluded that the increase of an existing sentence violated both the Fifth Amendment to the United States Constitution and Article 1, §10 of the Pennsylvania Constitution. It distinguished that situation from an increase over the original sentence following retrial, as permited in North Carolina v. Pearce, supra. This opinion expressly relied, at least in part, upon the Pennsylvania Constitutional provision.

The Commonwealth alleges in its Petition for Writ of Certiorari that the Pennsylvania Supreme Court relied exclusively on federal cases interpreting the United States Constitution or on state cases which were based exclusively on federal precedent. Petition, p.12, footnote 2. However, the Commonwealth completely ignored all of the state cases set forth above, relied on by the Pennsylvania Supreme Court, and which are not grounded exclusively on the federal constitutional provision, and which specifically rely on the Pennsylvania Constitution and public policy, as set out above.

Furthermore, and most important, the Supreme Court of Pennsylvania's factual findings, that the sentencing judge did not intend a different result (as set out in Argument 3, p.10, infra), provides an adequate state ground for the State court's decision.

2. This Court's decision in United States v. DiFrancesco, 449 U.S. 117 (1980), is not applicable in the case at bar.

The Commonwealth relies upon this Court's decision in United States v. DiFrancesco, 449 U.S. 117 (1980), for the proposition that even without statutory authority a validly imposed sentence can be increased, and does not have the qualities of constitutional finality that attend an acquittal. That is an unjustifiably broad reading of that case.

In that case, this Court upheld a statute which permitted the Government, after defendant had been sentenced, to seek an increase in sentence provided the defendant could be proved to be a "dangerous special offender". The Court there noted that under that statute, the defendant is charged with knowledge of the statute and its appeal provisions, and therefore has no expectation of finality in his sentence nor prohibiting review under the double jeopardy clause of the Fifth Amendment until the appeal is concluded or the time for appeal has expired. Here there is no comparable Pennsylvania Statute.[6]

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6 At the time of the trial and sentence here, there was no statutory provision in Pennsylvania for appeal of sentences. A subsequently enacted statute provides for Commonwealth appeals from sentences invalidly imposed in violation of guidelines enacted by the State. See 42 P.S. §9781 effective in December 1980. However, even under that statute, there is no right to appeal a validly imposed sentence.

The federal cases cited by the Commonwealth in its Petition, are all based on DiFrancesco. In each of those cases the decision was rendered by the court of initial appellate jurisdiction, namely the Court of Appeals. In the case at bar, the Superior Court properly refused to remand for resentencing, since to do so would have violated the constitutional principles enunciated in two unanimous decisions of the Pennsylvania Supreme Court. The Pennsylvania Supreme Court therefore properly held that the Superior Court had acted properly in refusing to remand for resentencing. It should be noted that in this case Respondent did not file a cross-appeal from the decision of the Superior Court affirming the convictions on which sentence had been suspended. Therefore, as previously noted, valid sentences had been imposed (suspended sentences), the Superior Court had affirmed those convictions and sentences, and Respondent had not appealed from the Superior Court's affirmance, and there was no statutory authority for the Commonwealth to appeal. Thus, those sentences were final. The Pennsylvania Supreme Court properly concluded that to remand for imposing heavier sentences on those judges merely because defendant had successfully appealed other charges would violate due process and double jeopardy, protections provided by the Pennsylvania Constitution as well as the United States Constitution.

3. There was no mere clerical or legal error to be corrected here.

The Commonwealth argues that the double jeopardy guarantee against multiple punishments was never designed to frustrate the sentencing intentions of trial courts by prohibiting correction of errors, either clerical or legal. Petition, p.16. The Supreme Court of Pennsylvania rejected

that contention by reliance upon its prior decision in Commonwealth v. Brown, supra, holding that the sentence imposed was what the sentencing judge intended it to be, and therefore the Commonwealth's request would be a clear double jeopardy violation. The Pennsylvania Supreme Court noted that the trial court at resentencing had before him 78 informations upon which sentences could have been imposed. The challenged validity of the theft charges had been raised at the pre-trial stage and was known to and ruled upon by the trial judge in his disposition of post-verdict motions. The trial judge elected after consideration to impose a prison sentence on only one of the 78 charges and the one chosen was one who knew was being challenged as being barred by the statute of limitations. See Opinion of the Supreme Court, Appendix A to Petition for Writ, pp.35A-36A.

This Court seeks neither to find facts, Grayson v. Harris, 467 U.S. 352, 358 (1925), nor to correct errors of state law. Barclay v. Florida, 463 U.S. 939, reh. denied, 104 S.Ct. 209 (1983); Beck v. Washington, 369 U.S. 541, 555, reh. denied, 370 U.S. 965 (1951). Thus, there is no constitutional or statutory authority for this Court to substitute its judgment for that of the Pennsylvania Supreme or Superior Courts concerning the intention of the trial judge, based on the reading of the record by those Courts.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted:

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REPLY BRIEF

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

84-(2)

NO. 1852

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

BENJAMIN GOLDHAMMER,
Respondent

PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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July 24, 1985

10 pp

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

NO. 1852

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

BENJAMIN GOLDHAMMER,
Respondent

PETITIONER'S REPLY BRIEF ON
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

Petitioner, the Commonwealth of Pennsylvania, seeks a Writ of Certiorari to review the Judgment and Opinion of the Supreme Court of Pennsylvania entered in this case on March 29, 1985.

SUPPLEMENTAL STATEMENT OF THE CASE

In this reply brief, petitioner, the Commonwealth of Pennsylvania, pursuant to U.S. Sup. Ct. Rule 22.5, addresses only respondent's challenges to the jurisdiction of this Court.

ADDITIONAL REASONS FOR GRANTING THE WRIT

THE PENNSYLVANIA SUPREME COURT'S INTERPRETATION OF THE FEDERAL DOUBLE JEOPARDY CLAUSE WAS THE SOLE GROUND FOR ITS DECISION.

Respondent seeks to prevent this Court's review by contriving two supposed independent state grounds for what is, on its face, a forthright decision based explicitly and solely on the federal double jeopardy clause.

First, respondent urges that the state constitution's double jeopardy clause provides an independent state ground for the decision. While the state provision might have supplied an alternate ground, the state court plainly did not base its decision on the state constitution.[1] The

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[1]The state court has on several occasions interpreted the state constitution to furnish an accused rights beyond those guaranteed by the federal constitution. When it

(Footnote 1 continued on next page.)

court explicitly held that the state provision is co-extensive with the federal double jeopardy clause and discussed the state constitution no further. In such circumstances this Court has found no independent state ground and has accepted jurisdiction over federal constitutional claims. Delaware v. Prouse, 440 U.S. 648, 653 (1979) (Even when Delaware court held that state and federal constitutions were both violated, no independent state ground existed since the Delaware constitution was not independent of the federal constitution but was "automatically interpreted at least as broadly as the Fourth Amendment.").

(Footnote 1 continued from previous page.)

has chosen to depart from federal law, however, the court has always done so explicitly, stating a clear independent state ground. See Commonwealth v. Sell, 504 Pa. 46, 470 A.2d 457 (1983); Commonwealth v. DeJohn, 486 Pa. 32, 403 A.2d 1283 (1979), cert. denied, 444 U.S. 1032 (1980).

The Pennsylvania court expressly declined to interpret its own constitution more strictly than the federal. It did, however, impermissibly impose, as a matter of federal constitutional law, a stricter standard for double jeopardy than that enunciated by this Court. Oregon v. Hass, 420 U.S. 714 (1975). That action should be reviewed by this Court.

The second "state ground" alleged by respondent is that the state supreme court made a "factual finding" that the trial court intended the ultimate result: that defendant should receive no prison sentence at all for his lengthy scheme of thefts. The supreme court, however, made no such finding. The court stated only that the sentence imposed was what the trial court intended (Appendix A to Petition for Writ of Certiorari, p.35). Speculation that the trial court really intended that

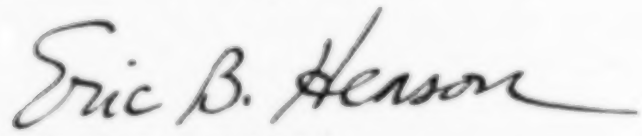
respondent escape punishment would have been irrelevant to and inconsistent with the court's holding on the constitutional issue. Double jeopardy was implicated at all only because of the possibility that defendant may be resentenced on remand to the trial court.

There is no independent state ground for the Pennsylvania Supreme Court's double jeopardy ruling below. This Court should review that ruling for the reasons stated in the Commonwealth's petition for writ of certiorari.

CONCLUSION

For all the foregoing reasons, as well as the reasons set forth in its prior petition, the Commonwealth of Pennsylvania respectfully requests that a Writ of Certiorari issue to review the decision below.

Respectfully submitted,



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July 24, 1985

IN THE SUPREME COURT
OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA, Petitioner	:	OCTOBER TERM, 1984
v.	:	
BENJAMIN GOLDHAMMER, Respondent	:	NO. 1852

CERTIFICATION OF SERVICE

I, ERIC B. HENSON, Counsel for Petitioner, hereby certify that on this 24th day of July, 1985, three (3) copies of this Reply Brief on Petition for Writ of Certiorari to the Supreme Court of Pennsylvania were mailed, postage prepaid, to Stanford Shmukler, Esquire, 2400 Packard Building, 15th and Chestnut Streets, Philadelphia, Pennsylvania 19102, Counsel for Respondent.

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Sworn to and subscribed before me this 24th day of July, 1985, A.D. :

Joyce N. White

NOTARY PUBLIC

My Commission Expires: 9/19/87

JOYCE N. WHITE
Notary Public, Phila., Phila. Co.
My Commission Expires Sept. 19, 1987

OPINION

SUPREME COURT OF THE UNITED STATES

PENNSYLVANIA *v.* BENJAMIN GOLDHAMMER

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

No. 84-1852. Decided November 12, 1985

PER CURIAM.

The Supreme Court of Pennsylvania held below that the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution barred the resentencing of the respondent. We grant certiorari and, on the basis of our decision in *United States* v. *DiFrancesco*, 449 U. S. 117 (1980), we reverse and remand. The motion of respondent for leave to proceed in forma pauperis is granted.

The respondent was convicted in the Philadelphia Court of Common Pleas on 56 counts of forgery and 56 counts of theft. He was sentenced by the trial court to two-to-five years of imprisonment on a single theft count and five years of probation on one of the forgery counts. Sentence was suspended on the remaining counts.

The respondent appealed all 112 convictions to the Superior Court of Pennsylvania. That court ruled that the statute of limitations barred the prosecution of 34 of the theft counts, including the count on which the respondent had received his sentence of imprisonment.

On appeal by the Commonwealth, the Supreme Court of Pennsylvania affirmed the Superior Court's ruling on the statute of limitations. In addition, the Supreme Court of Pennsylvania denied the petitioner's request that the case be remanded to the trial court for resentencing on the remaining 22 theft counts. The court acknowledged that a defendant could be twice sentenced for the same count when there was an intervening retrial, at the request of the defendant, but it held that resentencing on the counts which were affirmed after an appeal by the Commonwealth is barred by the Dou-

ble Jeopardy Clause when the sentence of imprisonment on another count is vacated. Petition for Certiorari at 27A–29A, citing *North Carolina* v. *Pearce*, 395 U. S. 711 (1969).

The Pennsylvania Supreme Court's rationale is inconsistent with the rationale of the holding of this Court in *DiFrancesco*, *supra*. In *DiFrancesco* we upheld the constitutionality of 18 U. S. C. §3576, which allows the United States to appeal to the Court of Appeals the sentence given a "dangerous special offender" by a District Court, and allows the Court of Appeals to affirm the sentence, impose a different sentence, or remand to the District Court for further sentencing proceedings.

We noted that the decisions of this Court "clearly establish that a sentenc[ing in a non-capital case] does not have the qualities of constitutional finality that attend an acquittal." *DiFrancesco*, *supra*, at 134. In *North Carolina* v. *Pearce*, *supra*, we held that a court could sentence a defendant on retrial more severely than after the first trial. Any distinction between the situation in *Pearce* and that in *DiFrancesco* is "no more than a 'conceptual nicety.'" *DiFrancesco*, *supra*, at 136 (quoting *Pearce*, *supra*, at 722). Indeed, a resentencing after an appeal intrudes even less upon the values protected by the Double Jeopardy Clause than does a resentencing after retrial:

> "[T]he basic design of the double jeopardy provision [is to] bar . . . repeated attempts to convict, with consequent subjection of the defendant to embarrassment, expense, anxiety, and insecurity, and the possibility that he may be found guilty even though innocent. These considerations, however, have no significant application to the prosecution's statutorily granted right to review a sentence. This limited appeal does not involve a retrial or approximate the ordeal of a trial on the basic issue of guilt or innocence." *DiFrancesco*, *supra*, at 136.

In *DiFrancesco* a federal statute clearly allowed the appellate review of the sentences at issue. The Court noted that, in light of that statute, the defendant could not claim any expectation of finality in his original sentencing. *Id.*, at 136, 139. Here, because the Pennsylvania Supreme Court held that resentencing was barred by the Double Jeopardy Clause, there was no need to consider below whether the Pennsylvania laws in effect at the time allowed the state to obtain review of the sentences on the counts for which the sentence had been suspended. We reverse and remand the case to the Supreme Court of Pennsylvania for a determination of that issue, and for further consideration of this case in light of *DiFrancesco*, *supra*.

Reversed and remanded.

JUSTICE BRENNAN dissents from summary disposition and would vote to deny the petition.

JUSTICE MARSHALL dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits. See *Maggio* v. *Fulford*, 462 U. S. 111, 120–121 (1983) (MARSHALL, J., dissenting); *Wyrick* v. *Fields*, 459 U. S. 42, 51–52 (1982) (MARSHALL, J., dissenting).

JUSTICE BLACKMUN would grant the petition and set the case for argument.

OPINION

SUPREME COURT OF THE UNITED STATES

PENNSYLVANIA *v.* BENJAMIN GOLDHAMMER

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

No. 84–1852. Decided November 12, 1985

JUSTICE STEVENS, dissenting.

In *United States* v. *DiFrancesco*, 449 U. S. 117 (1980), this Court upheld the constitutionality of a federal statute that permitted government appeals from certain sentences. Today, the Court summarily reverses because it finds that the "Pennsylvania Supreme Court's rationale is inconsistent with the rationale of the holding of this Court in *DiFrancesco*." *Ante*, at 2.

The Pennsylvania Supreme Court opinion does not mention *DiFrancesco*. The appellate briefs before the Pennsylvania Court did consider that case, however.[1] Indeed, Mr. Goldhammer argued that *DiFrancesco* did not govern precisely because no Pennsylvania statute authorized government appeals of sentences at the time of his conviction and sentencing.[2] Mr. Goldhammer has raised the same argument before this Court in his response to the Commonwealth's petition.[3] Moreover, it should be noted that, unlike the situation in *DiFrancesco*, the Pennsylvania prosecutor made no attempt to take an appeal from the sentences imposed by the trial court. The Commonwealth, in its petition and in its reply, has not adequately addressed these points.

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[1] See Appellant's br. at 13 n. 3; Appellee's br. at 13–15.

[2] See Appellee's br. at 14 ("At the time the instant case arose in Pennsylvania, the Commonwealth did not have the right to appeal from a sentence. That right did not exist until the sentencing guidelines were approved in July, 1982. See 42 Pa. C. S. A. § 9781.").

[3] See Respondent's br. at 9 n. 6 ("At the time of the trial and sentence here, there was no statutory provision in Pennsylvania for appeal of sentences.").

The majority recognizes that the Pennsylvania Court's judgment may ultimately be supported by state law grounds. See *ante*, at 2. In view of that uncertainty, and in view of the Commonwealth's failure to address this important issue, I would simply deny certiorari.[4] I would presume that the Pennsylvania Supreme Court determined that *DiFrancesco* did not govern for the plausible state law reason that had been argued to it.

Three factors support this presumption. First, Pennsylvania's current statutory framework for permitting government appeals from sentences was not in place at the time of Mr. Goldhammer's conviction and sentencing.[5] Second, Pennsylvania courts are now applying the new statutory framework,[6] with full knowledge of *DiFrancesco*.[7] Third, and perhaps most importantly, we should assume that a state Supreme Court is familiar with this Court's precedents and with its own state's law. Because the majority's summary reversal reflects a contrary assumption, I respectfully dissent.

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[4] See S. Ct. Rule 21.5 ("The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of points requiring consideration will be a sufficient reason for denying his petition.")

[5] See 42 Pa. S. C. A. § 9781 (1985); 204 Pa. Code § 303.1 et seq., reproduced after 42 Pa. S. C. A. § 9721 (1985).

[6] See, *e. g.*, *Commonwealth* v. *Dixon*, 496 A. 2d 802 (Pa. Super. Ct. 1985); *Commonwealth* v. *Hutchinson*, 496 A. 2d 956 (Pa. Super. Ct. 1985); *Commonwealth* v. *Drumgoole*, 491 A. 2d 1352 (Pa. Super. Ct. 1985).

[7] See *Commonwealth* v. *Drumgoole*, 491 A. 2d at 1356 n. 2 ("Appellee also suggests that to grant the relief sought by the Commonwealth 'would appear to be a violation of the Fifth Amendment Constitutional guarantee against double jeopardy.' This argument has been resolved contrary to appellee's claim. *United States* v. *DiFrancesco*, 449 U. S. 117 . . . .")